Office of Chief Counsel
Internal Revenue Service

memorandum

CC:MSR:KSM:KCY:TL-N-7283-99
MLBoman

date: JAN 12 2000

to: Chief, Appeals Division, Kansas-Missouri District
Attention: Timothy M. Roth, Associate Chief, Group I

from: Associate District Counsel, Kansas-Missouri District, Kansas City

subject: **Method of Assessment of Excise Tax**

[redacted]
EIN: [redacted]
CEP Taxpayer

[redacted]
EIN: [redacted]

[redacted]
EIN: [redacted]

This is in response to your memorandum dated December 6, 1999, seeking advice on how an unpaid liability for excise taxes should be assessed for three parties. We confine our discussion to the proper party to be assessed. We have not considered the merits of the adjustments.

FACTS

The short version of the facts are that [redacted] purchased an [redacted] for its own use and thereafter entered into a agreement with [redacted], for a partial lease of the [redacted] by [redacted]. Thereafter, the [redacted] and the lease were transferred to a newly formed subsidiary, [redacted]. Examination has determined that the lease payments were subject to excise tax. The issue that we have been asked to address is who is liable for the tax and to what extent whipsaw positions should be maintained.

Other parties besides [redacted] also utilized the [redacted]. [redacted] and its affiliates utilized the [redacted] approximately [redacted]% of the [redacted], with nonaffiliated related companies utilized another [redacted]%. [redacted] utilized the [redacted] [redacted]% of the time, and other unrelated parties utilized the [redacted] about [redacted]% of the time.

Examination has proposed the following assessments of excise taxes:

Period	[redacted]	[redacted]	[redacted]
[redacted]	$ [redacted]	$ [redacted]	$ [redacted]
[redacted]	$ [redacted]	$ [redacted]	$ [redacted]
Total	$ [redacted][1]	$ [redacted]	$ [redacted][3]
Less [redacted] taxes	[redacted]	[redacted]	

[1]Plus penalties of $[redacted].

[2]Plus penalties of $[redacted].

[3]Plus penalties of $[redacted].

DISCUSSION

1. Liability of [redacted]

Section 4261 of the Code provides an excise tax on amounts paid for air transportation. As a general rule, the tax is paid by the person making the payment. I.R.C. § 4261(d). The duty to collect the tax is however on the person receiving payment. I.R.C. § 4291(a). Treas. Reg. § 49.4261-10 provides:

> The tax imposed by section 4261 is payable by the person making the taxable payment for transportation or for seats, berths, etc., and is collectible by the person receiving such payments. See sections 4264(a) and (c) for special rules relating to payment and collection of tax.

Prior to amendment by section 1031 of the Taxpayer Relief Act of 1997, I.R.C. § 4263 provided as follows:

> **(c) Payment of tax.**
>
> Where any tax imposed by section 4261 is not paid at the time payment for transportation is made, then, under regulations prescribed by the Secretary, to the extent that such tax is not collected under any other provisions of this subchapter -
>
> (1) such tax shall be paid by the person paying for the transportation or by the person using the transportation;
>
> (2) such tax shall be paid within such time as the Secretary shall prescribe by regulations after whichever of the following first occurs:
>
> (A) the rights to the transportation expire: or
>
> (B) payment of such tax shall be made to the Secretary, to the person to whom the payment for transportation was made, or, in the case of transportation other than transportation described in section 4262(a)(1), to any person

> furnishing any portion of such transportation.

The effective date of the amendment was (in general) October 1, 1997. Taxpayer Relief Act of 1997, Pub. Law 105-34,§ 1031(e)(2), 111 Stat. 932. Therefore, this case is controlled by the old version of section 4263(c).[4]

The duty of the person paying for the transportation to pay the tax is set forth in Treas. Reg. § 49.4261-10, which provides as follows:

> The tax imposed by section 4261 is payable by the person making the taxable payment for transportation or for seats, berths, etc., and is collectable by the person receiving such payments. See section 4264(a) and (c) for special rules relating to payment and collection of tax.

Treas. Reg. § 49.4261-10, set forth above, makes clear the duty of the user of the transportation to pay the tax. Treas. Reg. § 4264(c)-1 makes clear that this liability exists irrespective of the failure of the seller to collect, by providing:

> (a) Rule--(1) In general. Except as provided in subparagraph (2) of this paragraph, when any tax imposed by section 4261 is not paid at the time payment for the transportation is made, then to the extent that such tax is not collected under any other provision of law, such tax shall be paid by the person paying for the transportation or by the person using the transportation. The provisions of section 4264(c) apply where the amount paid for transportation is (i) subject to tax at the time such payment is made, but no tax is paid at that time, or (ii) not subject to tax at the time such payment is made, but because of some subsequent event the payment becomes subject to tax. The payment of tax shall be made to the district director of internal revenue for the District in which the taxpayer resides, or to the person from whom the transportation was purchased, within 30 days after

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[4]The amendment only imposed secondary liability on the seller. Even under the amendment, primary liability would remain with [redacted].

whichever of the following first occurs: (a) The rights to the transportation expire, or (b) the transportation becomes subject to tax. Such payment shall be accompanied with an explanation that it is being made in accordance with section 4264(c).

Although the duty to collect is originally imposed on the seller of the transportation services, the actual liability is imposed on the buyer. Air Tour Acquisition Corp. v. United States, 781 F. Supp. 669 (D. Hawaii 1991). Under the statutory and regulatory framework set forth above, the liability for the tax, if not collected when due, remains with the buyer, in this case [redacted].

You have not asked our views on the merits of the case, and none is expressed.

We note that this analysis would also support the direct imposition of the excise tax upon [redacted] to the extent it paid [redacted] for transportation and to the extent it was not eligible for relief under the affiliated group exception of section 4282. As with [redacted], we are not addressing the merits of the tax or the includibility of certain payment in the excise tax base. This memorandum only addresses who is the proper party to assess.

2. Liability of [redacted] and [redacted]

As discussed above, the primary obligation for the tax is upon the buyer. Nevertheless, section 4291 imposes upon the seller the obligation to collect the tax. See also Treas. Reg. § 49.4261-10. Taxes actually collected are reported on Form 720 with other excise taxes.

Section 4291 of the Code requires the supplier of air transportation to collect the tax. It however does not in and of itself make the seller liable for taxes that were not collected. Air Tour Acquisition Corp. v. United States, 781 F.Supp. 669 (D. Hawaii 1991).

This case is consistent with the prior announcement of the Service with respect to admissions and cabaret excise taxes in Rev. Rul. 59-295, 1959-2 C.B. 420, obsoleted, Rev. Rul. 69-227, 1969-1 C.B. 315. In that case, the Service ruled:

> The admissions tax is one of the so-called "collected" taxes. That is, the person paying the admissions charges is the taxpayer, whereas the person collecting the charge is responsible under the law for collecting and returning the tax to the Government. Thus, the person collecting the charge is not the taxpayer and, even if he fails to collect the tax, willfully or otherwise, the tax as such cannot be asserted against him. In the case of a willful failure to collect or pay over the tax, the law provides sanctions in the form of penalties.

In Air Tour Acquisitions, the Court noted that prior cases against the provider of air transportation had been by way of the 100% penalty under I.R.C. § 6672. See also Lake Mead Air, Inc. v. United States of America, 991 F. Supp. 1209 (D. Nev. 1997)(I.R.C. § 6672 utilized to enforce section 4291 with respect to transportation taxes).

Application of these principles is illustrated by a number of private letter rulings.[5] In PLR 9545001, 1997 PRL LEXIS 1266 (July 18, 1997), it was held by the Service:

> We have been asked whether the Service can directly assess X for the section 4261 tax. The section 4261 tax is a collected tax and X is the collector, not the taxpayer. Thus, the Service cannot assess X. However, section 6672 provides for a 100 percent penalty assessment against persons who have willfully failed to collect or pay over to the Internal Revenue Service employment or excise taxes. Here the taxpayer has failed to collect excise taxes on that portion of the amount paid for air transportation allocable to the charges discussed above. The only issue is whether such failure was willful within the meaning of section 6672.

See also PLR 9527008, 1995 PRL LEXIS 657 (March 23, 1995); PLR 954003, 1995 PRL LEXIS 520 (March 2, 1995). The Internal Revenue Manual provides that the Trust Fund Recovery Penalty is available to collect the transportation tax under I.R.C. § 4261. IRM 563(17).1.

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[5]The private letters are not precedent. Nevertheless, they are useful statements of the reasons why the sellers of transportation are not taxed.

Section 1031(c) of the Taxpayer Relief Act of 1997, 111 Stat 932, amended section 4263 to provide for secondary liability of a carrier for unpaid tax. Section 4263(c) now provides:

(c) Payment of tax.

> Where any tax imposed by section 4261 is not paid at the time payment for transportation is made, then, under regulations prescribed by the Secretary, to the extent that such tax is not collected under any other provisions of this subchapter, such tax shall be paid by the carrier providing the initial segment of such transportation which begins or ends in the United States.

This provision is a modification of the existing law. The House Report states in its Explanation of Provisions:

> *Liability for tax.*-The present-law provision imposing liability for the tax on passengers (with transportation providers being liable for collecting and remitting revenues to the Federal Government) are modified to impose secondary liability on air carriers.

H.R. Rep. No. 105-148, at 484, 105th Cong., 1st Sess., reprinted in 1997 U.S.C.C.A.N 678, 878. The extension of secondary liability is a modification of the prior rule that passengers are liable for the tax, air carriers only for collection and remittance. H.R. Conf. Rep. No. 105-2209, at 551-56, reprinted in 1997 U.S.C.C.A.N 1363-68. Thus, it is our opinion that the excise cannot be assessed directly against the lessor of the plane for the years in question.

As noted above, action against the lessor would be by way of the trust fund recovery penalty under I.R.C. § 6672.

Also as noted above, [redacted] could be liable as the purchaser of transportation from [redacted].

CONCLUSION

For the years in question, assessments of the air transportation excise tax should be made against the party using the transportation.

We believe that the question in this case is answered by reference to well-settled principles of law. We have therefore not obtained Field Service Advice in this case. This opinion is however subject to postreview by the National Office under CCDM (35)3(19)4. We will of course advise you if they have any significant disagreements.

Since no further action is required at this time, we are closing our file. Questions concerning this matter may be directed to Michael L. Boman at (816) 283-3046, extension 107.

(signed) Michael L. Boman

MICHAEL L. BOMAN
Senior Attorney